

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 5307

IN THE MATTER OF:

Served April 7, 1998

Proposed Rulemaking Amending RULES) Case No. MP-98-11
OF PRACTICE AND PROCEDURE AND)
REGULATIONS, REGULATION NO. 51)

Pursuant to Title II of the Compact, Article XIII, Section 3 and Commission Rule No. 30, the Commission hereby initiates a proposed rulemaking for the purpose of considering an amendment to Commission Regulation No. 51, "Definitions," which would add a definition of the phrase "newspaper of general circulation in the Metropolitan District," which appears in Commission orders requiring publication of notice and in Regulation No. 54-05(b).

The Commission routinely requires applicants for operating authority to publish notice in a "newspaper of general circulation in the Metropolitan District" informing the public of the applicant's name and address, the deadline for filing protests, and the telephone number to call for further information. Similarly, when a hearing is scheduled on an application for operating authority, Regulation No. 54-05(b) requires that the applicant publish notice of the hearing in a "newspaper of general circulation in the Metropolitan District." That phrase, however, is not defined in the Commission's Rules of Practice and Procedure or in the Commission's Regulations, nor has it been defined in any Commission order. This leaves applicants and Commission staff guessing which publications meet that description and which do not. The definition proposed herein would eliminate the guesswork.

We have reviewed a number of statutes and court decisions in an effort to develop a definition that reflects generally accepted criteria. The examples below are meant to be illustrative, not exhaustive, of the results of our review.

In the District of Columbia, a newspaper of general circulation is defined by statute as one "published in the District, once every two weeks or more frequently."¹

In Maryland, a newspaper of general circulation is statutorily defined as a publication that:

¹ Sheetz v. District of Columbia, 629 A.2d 515, 517 n.3 (D.C. 1993); Jones v. District of Columbia, 585 A.2d 1320, 1321 (D.C. 1990).

- (1) has at least 4 pages;
- (2) habitually contains news items, reports of current events, editorial comments, advertising matter, and other miscellaneous information that is of public interest and is found generally in an ordinary newspaper;
- (3) at least once a week for 6 months or more before publication of the notice or advertisement, has been published and distributed, by sale, from an established place of business;
- (4) has general circulation throughout the community where the publication is published; and
- (5) is entitled to be entered as second-class matter in the United States mail.²

In Virginia, a newspaper used for publishing legal notices must by statute:

- (1) have a bona fide list of paying subscribers;
- (2) have been published and circulated at least once a week for twenty-four consecutive weeks without interruption for the dissemination of news of a general or legal character;
- (3) have a general circulation in the area in which the notice is required to be published;
- (4) be printed in the English language; and
- (5) have a second-class mailing permit issued by the United States Postal Service.³

In Florida, a newspaper of general circulation is defined by statute as:

- (1) a newspaper printed in the language most commonly spoken in the area within which it circulates and
- (2) which is readily available for purchase by all inhabitants in the area of circulation, but
- (3) does not include a newspaper intended primarily for members of a particular professional or occupational group, a newspaper the primary function of which is to carry legal notices, or a newspaper that is given away primarily to distribute advertising.⁴

In California, a newspaper of general circulation is statutorily defined as:

² MD. ANN. CODE art. 1, § 28 (1996).

³ VA. CODE ANN. § 8.01-324 (Michie 1992).

⁴ FLA. STAT. ANN. § 163.3164(15) (West 1990 & Supp. 1997).

(1) a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character,

(2) which has a bona fide subscription list of paying subscribers, and

(3) has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement.⁵

Case law similarly holds that "proper construction of the term 'general circulation' requires consideration of both the qualitative and quantitative aspects of the publication."⁶ A newspaper which contains news of general interest to the community -- such as news of political, religious, commercial, or social affairs -- and which reaches a diverse readership is one of general circulation.⁷

[A] newspaper may ordinarily be said to be one of general circulation even though the paper is devoted to the interests of a particular class of persons and specializes in news and intelligence primarily of interest to that class, if in addition to such special news, the paper also publishes news of a general character and of a general interest, and to some extent circulates among the general public.⁸

"[T]he term 'of general circulation' . . . implies a necessity for some circulation among those to be affected by the contents of the purported notice."⁹ The newspaper must be available to all within the relevant area, and its circulation in that area must be more than de minimis and not limited to a single geographic sector.¹⁰ "There is,

⁵ CAL. GOV'T CODE § 6000 (West 1995).

⁶ Moore v. State, 553 P.2d 8, 21 (Alaska 1976).

⁷ Id. at 21; Gannett Co. v. State, No. Civ. A. 12815, 1993 WL 19714, at *4 (Del. Ch. Jan. 11, 1993).

⁸ Gannett Co., 1993 WL 19714 at *4; accord, Sunland Publishing Co. v. City of Jackson, 1997 WL 703161 at *5 (Miss. 1997); Shulansky v. Michaels, 484 P.2d 14, 16 (Ariz. Ct. App. 1971); Nevada State Press Ass'n v. Fax, Inc., 378 P.2d 674, 675 (Nev. 1963).

⁹ Gannett Co., 1993 WL 19714 at *4; Wahl v. Hart, 332 P.2d 195, 197 (Ariz. 1958).

¹⁰ Sunland Publishing Co., 1997 WL 703161 at *5; Gannett Co., 1993 WL 19714 at *4; Great Southern Media, Inc. v. McDowell County, 284 S.E.2d 457, 467 (N.C. 1981); see Benson v. City of Miami Beach, 591 So.2d 942 (Fla. Dist. Ct. App. 1991) (circulation not general where limited to certain towns in county).

however, no fixed number of readers or ratio of readers to the population necessary for a newspaper to be considered one of general circulation."¹¹

From these samples we have gleaned the following criteria generally used to identify newspapers of general circulation:

1. Frequent publication;
2. Publication of general news;
3. Circulation to paid subscribers;
4. General availability throughout area;
5. Minimum number of pages;
6. Minimum age; and
7. Eligibility as second class mail.

The definition we propose herein reflects the first four criteria. We do not believe the last three would add anything meaningful to our adoption of the others. The proposed definition is as follows:

51-13. Newspaper of general circulation in the Metropolitan District means a publication that:

- (a) is published at least once every two weeks;
- (b) contains news of general interest, such as news of political, religious, commercial or social affairs;
- (c) circulates to more than a de minimis number of paid subscribers in the Metropolitan District who are not confined to the jurisdiction of a single signatory to the Compact; and
- (d) is generally available throughout the Metropolitan District.

In conjunction with our proposal to establish a definition, we propose to grandfather three publications that by implication we have historically considered to be newspapers of general circulation in the Metropolitan District: The Washington Afro-American, the Washington Post and the Washington Times. It appears that these three meet the proposed definition, in any event.

Upon adoption of the final rule, an affidavit of publication from a newspaper which has not been grandfathered in this proceeding will be accepted as proof of publication in a newspaper of general

¹¹ Gannett Co., 1993 WL 19714 at *4 (circulation to 1.5% of population sufficient); see Moore, 553 P.2d at 22 & n.21 (statistical analysis inappropriate) (circulation of 130 out of 3,500 (3.7%) sufficient); see also Great Southern Media, 284 S.E.2d at 461-62 (circulation of 499 out of 15,864 (3.1%) sufficient); but see In re Carson Bulletin, 149 Cal. Rptr. 764, 770 (Cal. Ct. App. 1978) (circulation to 0.02% of relevant population not sufficient).

circulation in the Metropolitan District only upon a showing that the newspaper meets the definition in Commission Regulation No. 51-13. The proponent will bear the burden of proof. Upon conclusion of this proceeding, a publication desiring to establish itself as a newspaper of general circulation in the Metropolitan District may file a petition for a declaratory order under Commission Rule No. 10.

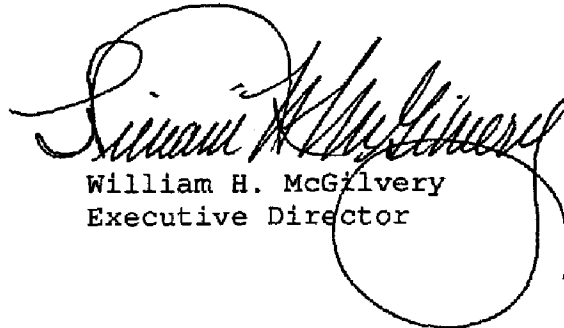
THEREFORE, IT IS ORDERED:

1. That a rulemaking is hereby proposed for the purpose of considering an amendment to the Commission's Rules of Practice and Procedure and Regulations, Regulation No. 51, as herein described.

2. That Commission staff shall publish a single notice of this proceeding in a newspaper of general circulation in the Metropolitan District, no later than April 14, 1998.

3. That any person desiring to comment on the amendment proposed in this notice shall file an original and four copies of such comment at the office of the Commission, 1828 L Street, N.W., Suite 703, Washington, DC 20036-5104, on or before May 7, 1998.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND MILLER:



William H. McGilvery
Executive Director